(1)

88-439

NO.

Supreme Court, U.S.
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CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1988

PHILIP LEONETTI and SALVATORE SCAFIDI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE PRESUMPTION OF DANGER TO THE COMMUNITY CONTAINED IN THE BAIL REFORM ACT OF 1984 HAS BEEN UNCONSTITUTIONALLY APPLIED TO PETITIONERS?

2. WHETHER THE LACK OF INDIVIDUALIZED CONSIDERATION OF THE FACTORS SUPPORTING RELEASE ON BAIL HAS DENIED PETITIONERS DUE PROCESS OF LAW?

3. WHETHER THE FAILURE TO CONSIDER IF CONDITIONS OF RELEASE CAN BE FASHIONED TO ASSURE THE SAFETY OF THE COMMUNITY IS AN UNCONSTITUTIONAL APPLICATION OF THE BAIL REFORM ACT OF 1984?

PARTIES

The caption of the case in this Court contains the names of all the parties to the instant Petition. The bail issues the subject of this Petition originally arose from a federal indictment naming a total of eighteen individuals: Nicodemo Scarfo; Petitioner LEONETTI; Salvatore Merlino; Joseph Ciancaglini, Francis Iannarella, Jr.; Lawrence Merlino; Charles Iannece; Salvatore Wayne Grande; Joseph Pungitore; Joseph Ligambi; Philip Narducci; Frank Narducci, Jr.; Eugene Milano; Nicholas Milano; Petitioner SCAFIDI; Ralph Staino, Jr.; Joseph Grande; Nicholas Virgilio; and Anthony Pungitore, Jr. The motion for bail, filed with and heard by the United States District Court for the Eastern District of Pennsylvania, was made on behalf of the above-named Petitioners and four co-defendants: Charles Iannece, Salvatore Wayne Grande, Joseph Pungitore, and Joseph Grande. Only the Petitioners appealed the denial of bail to the United States Court of Appeals for the Third Circuit.

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IN THE

United States Supreme Court

OCTOBER TERM, 1988

NO.

PHILIP LEONETTI and SALVATORE SCAFIDI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE OPINION BELOW

The Third Circuit issued separate opinions on behalf of the Petitioners. Neither opinion was published. They may be cited as *United States v. Leonetti,* slip op. no. 88-1483 (3rd Cir., delivered July 14, 1988) and *United States v. Scafidi,* slip op. no. 88-1484 (3rd Cir., delivered July 14, 1988). The test of both opinions are entirely identical. The only difference between the two opinions is the style of the case. In light of this fact, Petitioners have included the text only one time, and reproduced it as Appendix A herein. Petitioners have placed both styles at the top of the integrated opinion.

JURISDICTION OF THIS COURT

The United States Court of Appeals for the Third Circuit entered its Opinion and Judgment on July 14, 1988. No mo-

tion for rehearing was filed. Pursuant to Supreme Court Rule 20.4, this Petition is timely filed. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. sec. 1254(2) and Supreme Court Rule 17.1(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

The Bail Reform Act of 1984 can be found at 18 U.S.C. Sec. 3142. The Act is referred to throughout the Petition, but is far too lengthy to include herein.

STATEMENT OF THE CASE

Petitioners, along with sixteen other individuals, were named in a ten count indictment handed down by a federal grand jury in the Eastern District of Pennsylvania. The indictment charges several offenses, including violations of the Racketeering Influenced and Corrupt Organizations Act (RICO).

Six of the defendants filed motions for admission to bail. The Government sought pre-trial detention pursuant to 18 U.S.C. Sec. 3142(e). On June 9, 1988, the United States District

Court for the Eastern District of Pennsylvania filed a Memorandum and Order denying defendants' motions and ordering them detained pending trial of the cause. The Memorandum details the findings of the court and essentially recognizes that Petitioners do not pose a risk of flight. Instead, the court found detention appropriate in light of the potential danger to the community if *all six* defendants were released from custody. The Memorandum and Order is reproduced herein as Appendix B.

Only Petitioners LEONETTI and SCAFIDI sought review of the detention order in the Court of Appeals for the Third Circuit. Petitioners contended that the court should view the reasonableness of their release on an individualized basis, not en masse, as was done in the district court. The Petitioners pointed out the fact that neither had a history of actual violence; that they had never been convicted of a felony; that both had substantial ties to the community; and that they were willing to submit to whatever conditions the court felt necessary to ensure the safety of the community, including house arrest and constant monitoring, if necessary. The Petitioners also asserted their need to be free from incarceration in order to aid their counsels in preparation for the complex and lengthy trial of the charges. On July 14, 1988, that court entered two brief orders denying relief. (Reproduced as Appendix A) Neither opinion discussed the law or delineated evidence supporting the conclusion. Petitioners have, therefore, sought review from this Honorable Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Third Circuit denies Petitioners due process and equal protection of laws in that the decision to deny bail was based on the potential for harm to the community

if *all six defendants* were released from confinement. The opinion of the district court states:

> *The release of all six would enable the organization to rejuvenate itself* from its semi-dormancy caused by the incarceration of its members and inflict retribution against witnesses and their families. The Philadelphia La Cosa Nostra has instituted and enforced a systematic extortion scheme...(emphasis added)

See, United States v. Leonetti et al, slip op. no. 88-00003, p.8 (E.D.Pa., delivered June 9, 1988)(reproduced as Appendix B herein). It is Petitioners' contention that the district court's analysis of the impact of releasing six defendants should bear little relation to the instant case.[1] This kind of mass treatment of individual applications is offensive to all previous interpretations of Congress' intent in passing the Bail Reform Act and should not be allowed to set dangerous precedent. To assess the release of one person by the potential dangers of releasing others is a denial of the independent consideration of the particular citizen's circumstances that is the hallmark of Fifth Amendment due process.

2. The decision of the Third Circuit, denying bail without making an independent determination on the record, is without precedential support and is in direct conflict with prior decisions of that Circuit. In *United States v. Delker*, 757 F.2d 1390 (3rd Cir. 1985), the court held that, on reviewing bail decisions made by the district court, the court of appeals is required to make an independent determination on the record while according the district court's reasoning respectful consideration. *See also, United States v. Traitz*, 807 F.2d 322 (3rd

[1]None of the six defendants who applied for release have been granted bail pre-trial.

Cir. 1986); *United States v. Coleman*, 777 F.2d 888 (3rd Cir. 1985). In this case, however, the Third Circuit has failed to make the independent determination required, instead wholly deferring to the decision of the district court.

The decisions of the Third Circuit, reproduced herein as Appendix A, support Petitioners' contention. The opinions are brief — two pages long. The language and structure of the opinions reveals a complete absence of individualized consideration of the record. The opinions are merely recitations of the standards of review followed by a conclusion bare of supporting facts or authorities. The language of the opinions evidence the Court's complete deference to the decision of the District Court. Another fact showing a lack of individualized consideration of the factors unique to each Petitioner is that both opinions are identical. These facts demonstrate the absence of the thorough review previously mandated by the Third Circuit. Petitioners respectfully contend that they have been denied due process of law, in derogation of the Fifth Amendment to the United States Constitution.

3. The decision of the Third Circuit is not in conformity with the Bail Reform Act of 1984, as interpreted by that Circuit. The court did not properly weigh the availability of conditions that would reasonably assure the safety of the community. In a case decided under the Bail Reform Act of 1966, the Third Circuit writes:

> [T]he Bail Reform Act imposes a duty on federal courts not only to determine whether an applicant poses such risks, but must also measure them in terms of conduct that cannot be reasonably safeguarded against by an imposition of conditions upon the release. Given this statutory responsibility to set whatever restrictions on release are

> necessary to ensure against an applicant's flight or potential danger, bail should be denied under the Bail Reform Act only as a matter of last resort. In particular, the danger to the community must be of such dimension that only his incarceration can protect against it. *Chambers v. Mississippi*, 405 U.S. 1205, 1206 (1972); *Sellers v. United States*, 89 S.Ct. 36, 21 Led2d 64 (1968). Whenever the court can fashion the conditions of an applicant's release in such manner that the danger may be averted, it must do so and grant the motion for release.

United States v. Provenzano, 605 F.2d 85, 93-94 (3rd Cir. 1979). The concerns of the *Provenzano* Curt are just as applicable today. The Third Circuit affirmed the reasoning of *Provenzano* in *United States v. Traitz, supra*. In *Traitz*, as in the case at bar, the Government's chief concern was the safety of the community, and the two main defendants had never been convicted of any crime. The court did not minimize the seriousness of the charges against the defendants in *Traitz*, but emphasized that "the focus of the Bail Reform Act is on whether the conditions or combination of conditions will reasonably assure the safety of the community." *Traitz, supra*, 807 F.2d at 326.

4. The decision is in conflict with other circuits. In cases decided under the Bail Reform Act of 1984, the courts repeatedly have held that the standard is to reasonably assure safety, and the government cannot justify a citizen's pretrial detention without a showing that *no* conditions of release could guarantee the safety of the community. *United States v.Orta*, 760 F.2d 887 (8th Cir. 1985); *United States v. Fortna*, 769 F.2d 243 (5th Cir. 1985). Thus, the Fifth Circuit Court of Appeals held, in *Fortna, supra*, that "in ordering detention on this ground, the judicial officer should determine, from the information before him, that it is more likely than not that no

condition or combination of conditions would reasonably assure the accused's appearance''. In *United States v. Orta, supra*, the United States Court of Appeals for the Eighth Circuit made it clear that the question is whether there is a reasonable assurance for the safety of the community and a reasonable assurance that the accused will appear. It is not an absolute rule. Consistent therewith, the Court of Appeals for the Ninth Circuit in *United States v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985), held that not only should doubts regarding the propriety of release be resolved in favor of the Defendant, but that ''only in rare circumstances should release be denied.''

In the case at bar, it cannot be said that it is more likely than not that no condition or combination of conditions will reasonably assure the safety of the community. Petitioners have proposed that they be placed under house arrest with electronic monitoring and that they only be permitted to leave their respective residences with prior permission of Federal Pretrial Services. Other reasonable conditions were discussed at length in the motions made before the lower courts.

5. Review is merited in that the Court of Appeals for the Third Circuit has so far sanctioned the departure of the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This departure from accepted practice and procedure has resulted in the denial of Petitioners' right to a fair trial, grounded in due process. As discussed above, the District Court did not focus on the availability of conditions for each Petitioner that would reasonably assure the safety of the community. Where such conditions exist, logic dictates that release is appropriate as the danger to the community is thereby negated.

6. If the Petitioners have not been able to rebut the presumption, then the presumption is unconstitutional as applied.

The constitutional guarantee of due process of law is seriously impinged by an interpretation of this statute which holds that all individuals purportedly involved in organized crime are intended by the Congress of the United States to be detained. The presumption violates the due process clause of the Fifth Amendment to the Constitution of the United States, in that the rebuttable presumption fails to comport with the constitutional mandate[2] that there be a "rational connection between the basic facts that [Petitioners'] release, subject to any combination of financial and other restricting conditions will not reasonably assure [safety] and that the latter [i.e., the ultimate presumed fact] is more likely than not to flow from the former [i.e., the offense for which probable cause exists]." *County Court of Ulster County v. Allen*, 442 U.S. at 140, 165 (1979).

The complete absence of aggravating factors, with the exception of the present indictment, demonstrates that the presumption has been unconstitutionally applied to Petitioners. Petitioners respectfully contend that release based *solely* on community dangerousness must have strong support in the record. That support is lacking in the case at bar. Moreover, where dangerousness is the sole factor, the court should give greater weight to the likelihood of conviction. The record demonstrates that the potential for conviction of Petitioners is tenuous at best.[3] Indeed, Petitioners suspect that were it

[2]*County Court of Ulster County v. Allen*, 442 U.S. 140, 165 (1979); *Leary v. United States*, 395 U.S. 6 (1969).

[3]For example, the testimony received at the hearing on the bail motion came from two gentlemen who are admitted perjurers. Moreover, they have testified against Petitioners on prior occasions both of which resulted in acquittal. In both cases the Government alleged serious offenses. One involved charges of capital murder for which the prosecution sought the death penalty. The other was a continuing criminal enterprise prosecution which carried a possible sentence of life without parole. In each case, the jury rejected the testimony of the informants and found Petitioners not guilty.

not for their ethnic background and ties with the Italian-American community in Philadelphia, they would not have been indicted in the present cause. It is Petitioners' contention that the current fervor for prosecutions of organized crime in the Philadelphia area sweeps too broadly and has become a device for the persecution of innocent citizens of Italian lineage.

It is respectfully submitted that if Petitioners are denied release, the procedure has the unmistakable markings of the "permanent irrebuttable presumptions [which] have long been disfavored under the due process clause of the Fifth and Fourteenth Amendments." *Vlandis v. Kline*, 412 U.S. 441, 446 414 U.S. 631 (1974); *United States Department of Agriculture v. Murray*, 413 U.S. 508 (1973); *Stanley v. Illinois*, 415 U.S. v. Murray, 413 U.S. 508 (1973); *Stanley v. Illinois*, 415 U.S. 645 (1972); *Carrington v. Rash*, 380 U.S. 89, 96 (1965). Defendants have no prior convictions. The district court's concerns about the safety of witnesses is based purely on speculation as there is no history of actual violence to support the conclusion. Moreover, the court did not undertake analysis of appropriate conditions of release.

In line with the Eighth Amendment, the federal courts have traditionally provided that a person arrested for a non-capital offense shall be admitted to bail. *See e.g., United States v. Motamedi, supra* (declaring further that, "only in rare circumstances should release be denied."). It is the Government's burden to prove by "clear and convincing evidence that an arrestee present and identify an articulable threat to an individual in the community." *United States v. Salerno*, ____ U.S. ____, 107 S.Ct. 2095, 2103 (1987). In order to detain an accused, the Government must show by clear and convincing evidence that he would pose a danger to the community if released. Here, the Government has failed to meet the constitutionally mandated standard set forth in *Salerno*. Most

significantly, as this Court has held, "[d]oubts regarding the *propriety of the release should be resolved in favor of the defendants.*" *Herzog v. United States*, ____U.S.____ 75 S.Ct. 349, 352 (1955).

7. The decision of the Third Circuit has a substantial negative impact on Petitioners' rights under the Sixth Amendment. It is axiomatic that the right to effective assistance of counsel is both fundamental and absolute. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); *Chandler v. Fretag*, 348 U.S. 3 (1954). Indeed, as the *Gideon* Court made abundantly clear, "lawyers in criminal courts are necessities, not luxuries", pointing out that accordingly "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try Defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interests in an orderly society." *Gideon, supra*, 372 U.S. at 344.

As this Court admonished in the seminal case of *Powell v. Alabama, supra*, the right to effective assistance of counsel is rendered illusory if conferred only "under such circumstances as to preclude the giving of *effective aid* in the preparation for trial of the case."(emphasis in original) *Id.* at 68. The present incarceration of Petitioners in a facility remote from the offices of counsel is a serious detriment to preparation of the case for trial. Counsel for Petitioners must make arrangements to travel the considerable distance from Las Vegas, Nevada, to Philadelphia, Pennsylvania, to confer privately with their clients. The consultations must take place without the benefit of the legal resources of counsels' offices and staff and are necessarily limited by the restrictions of the penal institution. As a result, Petitioners' ability to assist in obtaining witnesses and evidence and generally provide counsel with aid in preparation for trial is markedly reduced. This is

particularly important in light of the *complex* nature of the instant case and the projected length of the proceedings. If Petitioners remain in custody, relevant, exculpatory defense evidence, available but for the incarceration will be lost forever; precluded from consideration by the court and jury as a direct result of the preguilt, pretrial detention.

8. Petitioners are not making a facial challenge to the Bail Reform Act, as was done in *United States v. Salerno*, 481 U.S.____, 107 S.Ct.____, 95 L.Ed 2d 697 (1987), but rather an attack on the way the Act has been applied to Petitioners.

CONCLUSION

This Honorable Court should grant the instant Petition to bring the decision of the Third Circuit into line with precedent. Neither Third Circuit precedent, nor the law of the other Circuit Courts, nor the precedent of this Court support the conclusion reached in the court below. This Court should exercise its supervisory powers to remedy the wrong that has been wrought against Petitioners and thereby bring greater uniformity to the assessment of orders of detention.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT #A-1

No. 88-1483

UNITED STATES OF AMERICA
v.
LEONETTI, PHILIP, a/k/a Phil,
Appellant
(E.D. Crim. No. 88-3-02) 9(A) Bail

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT #A-2

No. 88-1483

UNITED STATES OF AMERICA
v.
SCAFIDI, SALVATORE, etc.,
Appellant
(E.D. Crim. NO. 88-3-15 9(A) Bail

Present: SEITZ, GREENBERG and HUNTER, *Circuit Judges*.

This is the determination of appellant's motion for release from pretrial detention pursuant to an order by the district court holding him in custody pending trial.

We are required to make an independent determination on the record while according the district court's reasoning respectful consideration. *United States v. Delker*, 757 F.2 1390 (3d Cir. 1985).

The pending indictment under the so-called Rico statute, 18 U.S.C. Sections 1962(d)(d) and 1963, charges appellant inter alia, including Nicodemo Scarfo, with having committed various murders, extortions, loansharking and other criminal activities as members of an organized crime enterprise identified as La Cosa Nostra. The charges specifically relating to appellant are numerous and involve acts of violence. After an evidentiary hearing the district court ordered appellant's incarceration pending trial. Its elaborate memorandum fully recounts the controlling law and we have no occasion to disagree with it.

Based on the record before it the district court concluded that the government had carried its burden of proof by clear and convincing evidence that appellant is a danger to witnesses and the community. It also found that no condition or combination of conditions would reasonably assure the appearance of appellant and the safety of other persons and the community.

We have reviewed the record and the determinations in the memorandum of the district court and are equally satisfied that appellant's pre-trial incarceration is fully justified under the governing statutory provisions. Also, given the nature of the enterprise and the nature of appellant's involvement therein, we are equally satisfied that no conditions or combination thereof could reasonably assure the safety of others including the larger community. Such conclusions, in our view, are supported by clear and convincing evidence. We take notice that an early trial date has been fixed for this case.

ORDERED that the motion for pretrial release is denied.

By the Court

_____
Circuit Judge

DATED: July 14, 1988

GT/cc: OBG / DZC
LRP
MEK (D.C.)

APPENDIX B

FILED: JUNE-9, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 88-00003(02)
	:	(07)
v.	:	(08)
	:	(09)
PHILIP LEONETTI,	:	(15)
a/k/a Phil	:	(17)
CHARLES IANNECE,	:	
a/k/a Charlie White	:	
SALVATORE WAYNE GRANDE	:	
a/k/a Wayne	:	
a/k/a Waynie	:	
JOSEPH PUNGITORE,	:	
a/k/a Joe Pung, a/k/a JP	:	
a/k/a PJ, a/k/a Minskie	:	
a/k/a Herman	:	
SALVATORE SCAFIDI	:	
a/k/a Tore	:	
a/k/a Reds	:	
JOSEPH GRANDE	:	

VAN ANTWERPEN, J. JUNE 9, 1988

This opinion deals with the motions of six (6) defendants seeking bail and the motion of the United States seeking pre-trial detention pursuant to 18 U.S.C.A. Section 3142(a) (West Supp. 1988). On January 13, 1988, the United States filed a ten (10) count indictment charging the defendants Philip Leonetti, Charles Iannece, Salvatore Wayne Grande, Joseph Pungitore, Salvatore Scafidi, Joseph Grande and eighteen (18)

other defendants[1] with numerous offenses,[2] including violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C.A. Sections 1962(c) and (d) (West 1982). The offenses are alleged to have taken place from April, 1976 to October, 1987. This indictment was one of a number of charges which have been brought in both the state and federal courts against the alleged organized crime activities of the Philadelphia-South Jersey Mafia — *La Cosa Nostra* Organization *(La Costa Nostra)*.

The six named defendants did not previously seek bail because they were being held under state murder charges

---

[1]The total named defendants are : NICODEMO SCARFO, a/k/a Little Nicky, a/k/a The Little Guy; PHILIP LEONETTI, a/k/a Phil; SALVATORE MERLINO, a/k/a Chuckie; JOSEPH CIANCAGLINI, a/k/a Chickie; FRANCIS IANNARELLA, JR., a/k/a Faffy; LAWRENCE MERLINO, a/k/a Yogi; CHARLES IANNECE, a/k/a Charlie White; SALVATORE WAYNE GRANDE, a/k/a Wayne, a/k/a Waynie; JOSEPH PUNGITORE, a/k/a Joe Pung, a/k/a JP, a/k/a PJ, a/k/a Minskie, a/k/a Herman; JOSEPH LIGAMBI; PHILIP NARDUCCI; FANK NARDUCCI, JR.; EUGENE MILANO, a/k/a Gino; NICHOLAS MILANO, a/k/a Nicky Whip; SALVATORE SCAFIDI, a/k/a Gino; NICHOLAS MILANO, a/k/a Nicky Whip; SALVATORE SCAFIDI, a/k/ Tore, a/k/a Reds; RALPH STAINO, JR., a/k/a Junior; JOSEPH GRANDE: NICHOLAS VIRGILIO, a/k/a Nick the Blade; and ANTHONY PUNGITORE, JR.

[3]The indictment charges the following offenses:

COUNT NO . OF SECTION OF 18 U.S.C.A. CHARGED

1 1962(d); 1963 (RICO)
2 1962(c); 1963 (RICO)
3 1955; 2 (Illegal Gambling Business)
4 1955; 2 (Illegal Gambling Business)
5 846 (Conspiracy to Distribute Controlled Substance)
6 1951; 2 (Interference with Commerce by Extortion)
7 1951; 2 (Interference with Commerce by Extortion)
8 1951; 2 (Interference with Commerce by Extortion)
9 1951; 2 (Interference with Commerce by Extortion)
10 841(a)(1); 2 (Distribution of a Controlled Substance

which were not bailable.[3] These charges concerned the homicide of one Salvatore Testa, and, on May 10, 1988, a jury in the Court of Common Pleas of Philadelphia County — Criminal Division returned not guilty verdicts as to this homicide. In addition, on October 1, 1980, Philip Leonetti, the alleged Mafia "underboss", was found not guilty[4] of the murder of one Vincent Falcone in the Courts of the State of New Jersey, Atlantic County. The Testa and Falcone murders are charged as predicate acts in counts 1 and 2.

On Thursday, June 2, 1988, this court held a full evidentiary proceeding on defendants' bail motions and the motion of the United States for pre-trial detention. All six defendants were present with counsel and they were given an opportunity to testify, present witnesses, cross-examine, and make proffers. The relevant provisions of 18 U.S.C.A. Section 3142 (West Supp. 1988) read as follows:

---

[3]42 Pa. Cons. Stat. Ann. Section 5701 (Purdon 1981) provides that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great." A capital offense is one for which the death penalty may be imposed. *Commonwealth v. Heiser*, 330 Pa. Super. 70, 478 A.2d 1355 (1984). The penalty for first degree murder is life imprisonment or death. 18 Pa. Cons. Stat. Ann. Section 1102 (Purdon 1983).

Since defendants were not bailable until now, counsel agreed at the hearing that there are no issues concerning a failure to assert rights to an immediate hearing under 18 U.S.C.A. Section 3142(f) (West 1985 & Supp. 1988).

[4]There was one eye-witness, Frank Salerno, Jr., who is currently in the federal witness protection program. His father, Frank Salerno, was shot through the neck, but not killed, on August 10, 1982. (Notes of Testimony, p. 15). Another indictment against Leonetti concerning the murder of one Guiseppi Leva had to be dismissed on November 29, 1978, when the state's only eye-witness, Earl W. DeVault, recanted his identification after consultation with counsel. Counsel, Harold I. Garber, was subsequently suspended for one year. *See In Re Garber*, 95 N.J. 597 (1984)

(e) Detention. — If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial...

(f) Detention hearing. — The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community

(1) upon motion of the attorney for the Government, in a case that involves —

. . .

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 951 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et. seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955(a); or

(D) ...

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves —

(A) a serious risk that the person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror. . .

It is expressly provided in 18 U.S.C.A. Section 3142(f) that, at the hearing, "[t]he rules concerning admissibility of evidence in criminal trials do not apply . . ." Nevertheless, this subsection expressly requires that "[a] finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence." Risk of flight need only be proven by a preponderance of the evidence. *United States v. Himler*, 797 F.2d 156 (3d Cir. 2986). Subsection (a) also provides for a rebuttable presumption as follows:

> "Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955(a), or an offense under section 924(c) of title 18 of the United States Code."

In a determination concerning pre-trial detention, 18 U.S.C.A. Section 3142(g) (West Supp. 1988) goes on to require the court to take into account available information concerning:

> "(1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
>
> (2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including —

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release . . .

In *United States v. Salerno*, ____ U.S.____, 107 S.Ct. 2095 (1987), the Supreme Court held that it was constitutionally permissible to detain a defendant pre-trial under 18 U.S.C.A. Section 3141 merely on the basis of his danger to the community and the likelihood that he will commit future crimes. The Court made numerous references to the legislative history of the new act in arriving at its decision. Indeed, the legislative history includes the finding that "[w]here there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate." S.Rep. No. 225, 98th Cong., 2d Sess. 7, reprinted in 1984 U.S. Code Cong. Ad. News at 3189. Prior to the *Salerno* opinion, the Third Circuit had recognized that legislative intent mandated a definition of danger that went beyond that directed at a victim or witness. *United States v. Delker*, 757 F.2d 1390, 1393

(3d Cir., 1985). "The Congress was apparently concerned with the safety not only 'of a particular' identifiable individual, perhaps a victim or witness,' but also of the community as a whole." *Id.; See United States v. Strong*, 775 F.2d 504, 507 (3d Cir. 1985).

The pre-trial consideration of danger to the community under the new statute is essentially the same as the post-conviction consideration of danger under the superseded statute. The Third Circuit, in a decision prior to the enactment of the 1984 Bail Reform Act and a case cited in the act's legislative history, *United States v. Provenzano*, 605 F.2d 85 (3d Cir. 1979), instructed that community danger not only meant a crime of physical violence, but also included the commission of future economic crimes as well. *Id.* at 95)96.

The elements of risk of flight and danger to the community are to be read in the disjunctive so that an individual can be found to be a danger to the community although there may be insufficient evidence to find that he presents a risk of becoming a fugitive. *United States v. Coleman*, 777 F.2d 888 (3d Cir. 1985); *United States v. Delker*, 757 F.2d 1390 (3d Cir. 1985); *United States v. Askari*, 608 F.Supp. 1045, 1049 (E.D. Pa. 1985); *United States v. Kouyoumdjian*, 601 F.Supp. 506 (C.D. Cal. 1985).

Finally, we note that pre-trial detention is to be considered in conjunction with the provisions of the Speedy Trial Act, 18 U.S.C.A. Section 3161 *et seq.* (West. 1985 & Supp. 1988). *United States v. Colombo*, 777 F.2d 96, 100-101 (2d Cir. 1985). Although, in our previous opinion of May 16, 1988, we explained our reasons for granting continuances through November 1, 1988, the United States now indicates that it hopes to be ready to go to trial by September 6, 1988. With the fore-

going legal standards in mind, we shall review the hearing testimony and extensive hearing exhibits.

The indictment in this case charges that all eighteen defendants under the direction of lead defendant, Nicodemo Scarfo, are members of an organized crime enterprise known as the Mafia or *La Cosa Nostra*, which has committed numerous and repeated acts of violence, including murder, attempted murder, extortion, loansharking and other criminal activities. The crimes are some of the most serious and violent that can be charged. The individual criminal acts allegedly committed by each defendant will be examined, but these individual acts must always be viewed in the context of each defendant's alleged membership in *La Cosa Nostra* and what that membership and organization represents.

A willingness to kill people who testify against them and to enforce *Omerta*, the code of silence, through murder, are rules that each defendant adopts and agrees to adhere to through his membership in *La Cosa Nostra*. By these rules, each of the six defendants seeking bail presents a very real danger to potential witnesses in this case. While individually each poses a danger, together the six defendants pose a greater collective danger.

The release of all six would enable the organization to rejuvenate itself from its semi-dormancy caused by the incarceration of its members and inflict retribution against witnesses and their families. Of equal concern is the danger to the community that this would pose. The Philadelphia *La Cosa Nostra*, has instituted and enforced a systematic extortion scheme to collect a "street tax" or "tribute payment" from sports bookmakers, numbers operators, drug dealers, loansharks and other illegal operatives.

In particular, there was testimony from an F.B.I. agent at

the hearing that two witnesses, Thomas DelGiorno and Nicholas Caramandi, will testify for the United States, and have testified against *La Cosa Nostra* in prior cases. This prior testimony resulted in a conviction and fourteen-year prison sentence for defendant and alleged *La Cosa Nostra* boss Scarfo for the Hobbs Act attempted extortion of developer Willard Rouse. They also testified in a federal drug prosecution and in the state murder case concerning Salvatore Testa which resulted in not guilty verdicts.

DelGiorno and Caramandi have also testified against indicted but severed co-defendants of Scarfo at three federal trials. These trials resulted in the conviction of City Councilman Leland Beloff and his aid, Robert Rego, in their Hobbs Act prosecution for the attempted extortion of developer Willard Rouse and conviction of seventeen defendants in drug prosecutions. While the presence of these two in the witness protection program affords some measure of protection, past practice has shown that relatives can also be the subject of retribution.

Although there can be many reasons why a jury might return a verdict of not guilty, a guilty verdict requires proof beyond a reasonable doubt. Since the credibility of DelGiorno and Caramandi has, of necessity, risen to this level of proof, we have no difficulty in finding that the weight of evidence against the defendants is great, notwithstanding several instances of a failure to convict. At the very least, we would have to say that the evidence before us was clear and convincing.

Furthermore, the prior cases have all been only a part of the overall activities of *La Cosa Nostra*. In the instant case, there will be additional evidence, including recorded conversations, and physical evidence. Rather than just dealing with certain individual acts, the instant case broadly covers the activities of *La Cosa Nostra* for an extended period of time.

PHILIP LEONETTI

This defendant is charged in both RICO counts and five other counts of the indictment. The RICO conspiracy and substantive counts allege that the defendant is the underboss of the Philadelphia *La Cosa Nostra* and that he committed five separate murders or attempted murders and thirteen other predicate racketeering acts, including extortion, extortionate collection of credit, and gambling. The indictment also charges Leonetti with four substantive counts of federal extortion (Counts Six to Nine) and one count of conducting an illegal gambling business (Count Four).

Below are the eighteen predicate acts charged against Leonetti included in the RICO counts:

#8 Falcone Murder
#9 Frank Martines Attempted Murder
#10 Salvatore Tamburrino Murder
#11 Robert Riccobene Murder
#12 Salvatore Testa Murder
#15 Extortionate Collection of Credit from Joseph Salerno, Jr.
#19 Illegal Sports Bookmaking
#24 Extortion of J.H.
#25 Extortion of J.S.
#26 Extortion of L.S.
#27 Extortion of E.C.
#28 Extortion of D.V.
#29 Extortion of S.S.
#30 Extortion of B.M.
#31 Extortion of G.R.
#32 Extortion of S.C.
#33 Extortion of F.D.
#34 Extortion of S.M.

Leonetti is currently the underboss or second in command of the Scarfo *La Cosa Nostra* family. When the boss is unavailable, the underboss consults with the boss, if possible, and runs the family. The nature and circumstances of his position, coupled with the weight of the above charges and the obvious danger to witnesses and the community, mandates the continued incarceration of Mr. Leonetti, notwithstanding the hearing evidence concerning his personal characteristics.

CHARLES IANNECE

The defendant is alleged to be a soldier and member of *La Cosa Nostra*. He is charged in this case with predicate acts including seven murders or attempted murders, twelve extortions and one collection of unlawful debt in the RICO counts. Iannece is also charged with Hobbs Act extortion in four substantive counts (Counts Six to Nine).

Below are the twelve predicate acts listed by number and the collection of unlawful debt as charged in the RICO counts:

#6 Harry Riccobene Attempted Murder
#8 Pasquale Spirito Murder
#9 Frank Martines Attempted Murder
#10 Salvatore Tamburrino Murder
#11 Robert Riccobene Murder
#12 Salvatore Testa Murder
#14 Steven Vento, Jr. Attempted Murder
#24 Extortion of J.H.
#25 Extortion of J.S.
#26 Extortion of L.S.
#27 Extortion of E.C.
#28 Extortion of D.V.
#29 Extortion of S.S.
#30 Extortion of B.M.
#31 Extortion of G.R.

#32 Extortion of S.C.
#33 Extortion of F.D.
#34 Extortion of S.M.
#36 Hobbs Act Extortion of Rouse & Associates

According to Nicholas Caramandi, Iannece shot and killed one Pasquale Spirito in predicate act #8 and shot, but did not kill, Frank Martines along with Eugene Milano. (Notes of Testimony, pp. 20, 21; exh. G-3, pp. 343, 344). He also played a part in other murders and helped enforce collection of the "street tax". In early January, 1987, a warrant was issued for the arrest of Iannece and he was a fugitive from justice for more than nine months, until he was captured by the F.B.I. When arrested in the Poconos, he had several pieces of false identification (Notes of Testimony, pp. 21, 22). Accordingly, we are forced to conclude that the weight of the conduct charged and the risk of flight require the continued incarceration of Mr. Iannece, notwithstanding some positive hearing evidence about his personal circumstances.

SALVATORE WAYNE GRANDE

Grande is an alleged member and soldier in *La Cosa Nostra*. The defendant is charged in the RICO conspiracy and substantive counts with the attempted murder of Harry Riccobene (predicate act #6) and the murder of Salvatore Testa (predicate act #12).

There were two murder attempts on the life of Harry Riccobene resulting from his factional dispute with Scarfo. One attempt occurred in June, 1982, when Grande shot but did not kill Riccobene in a telephone booth. As already noted, a not guilty verdict was returned in the state murder trial pertaining to Salvatore Testa. Grande also served nine and a half months in jail for contempt of court from February 16, 1983 to November 30, 1983. He refused, despite immunization, to

answer any questions about *La Cosa Nostra* before a federal grand jury.

At the hearing, the Government introduced wiretap evidence reflecting upon Salvatore Wayne Grande's character and his danger to the community. It is found in a conversation between Salvatore Wayne Grande and Thomas DelGiorno intercepted and recorded by the New Jersey State Police in August, 1985, prior to Thomas DelGiorno's cooperation with authorities. None of the juries that have passed upon the credibility of Thomas DelGiorno have had the benefit of his recorded conversation, because it was not introduced at previous prosecutions. Part of the conversation deals with the collection of "street tax" by the Scarfo organization and the active part Grande is to play in this scheme. Accordingly, we again are led to the conclusion that the weight of the conduct charged requires the continued incarceration of Mr. Grande, notwithstanding some positive evidence about him at the hearing.

JOSEPH PUNGITORE

Jose Pungitore is also an alleged soldier and member in *La Cosa Nostra*. Counts One and Two of the indictment, the RICO counts, charge the defendant with predicate acts involving five separate murders or attempted murders, distribution of multipounds of methamphetamine, extortion of a drug dealer, conducting two illegal gambling businesses, and collection of two unlawful debts. Pungitore is also charged in two other substantive counts of the indictment: Count Four, illegal gambling business, and Count Five, conspiracy to distribute methamphetamine.

Below are the nine predicate acts, listed by number, and the collection of unlawful debts, as charged in the RICO counts:

#5 Frank Narducci Murder
#6 Harry Riccobene Attempted Murder
#9 Frank Martines Attempted Murder
#11 Robert Riccobene Murder
#12 Salvatore Testa Murder
#18 Illegal Lottery Business Number Three
J. Pungitore/Madgin/Louis M./John S.)
#19 Illegal Sports Bookmaking
#20 Distribution of Methamphetamine
#35 Extortion of Michael Madgin

Collection of Unlawful Debts
Paragraph 13c

#3 Sports Bookmaking Business
#5 J. Pungitore/Madgin Usurious Loan Business

Pungitore, along with Salvatore Testa, shot and killed Frank Narducci, Sr. He also assisted in the murder of Frank Martines and the attempted murder of Harry Riccobene. (Notes of Testimony, p. 33.) According to the indictment, (Overt Act #81), Pungitore "set up" his friend Salvatore Testa by luring him to the place where he was shot to death.

As already noted, there is a special provision in the statute applicable to Joseph Pungitore that favors pre-trial detention of suspected drug offenders by establishing a rebuttable presumption of both danger to the community and risk of flight. (18 U.S.C.A. Section 3142(e)).

The Third Circuit and other appellate courts have held that an indictment charging drug crimes with punishment greater than ten years is sufficient to initiate the presumption of pre-trial detention since the grand jury has already found probable cause in returning the indictment. *United States v. Suppa*, 799 F.2d at 119; *United States v. Hurtado*, 779 F.2d 1467 (11th

Cir., 1985); *United States v. Contreras*, 776 F.2d 51 (2d Cir. 1985). The presumption shifts the burden of producing evidence of lack of dangerousness to the defense. However, the burden of persuasion remains with the government. *United States v. Perry*, 788 F.2d 100, 114-115 (3d Cir. 1986).

The indictment charges Pungitore with distributing multi-pounds of methamphetamine, a Schedule II non-narcotic drug, for which conviction involves a maximum sentence of ten years or more . As such, there is a presumption of dangerousness that applies to Pungitore that buttresses the finding of danger resulting from his mob membership and other criminal activities related to that membership.

We conclude that the weight of the charges against Joseph Pungitore, and the presumption of danger arising from his alleged dealing in drugs outweighs any evidence of good character brought out at the hearing, and requires his continued incarceration.

SALVATORE SCAFIDI

Scafidi is charged with nine predicate acts of RICO racketeering and two collections of unlawful debts:

#12 Salvatore Testa Murder
#14 Steven Vento, Jr. Attempted Murder
#16 Illegal Lottery Business Number One (DelGiorno/Scafidi/Iannarella/N. Milano)
#17 Illegal Lottery Business Number Two (Merlino/DelGiorno/Scafidi)
#24 Extortion of J.H.
#25 Extortion of J.S.
#28 Extortion of D.V.
#29 Extortion of S.S.
#34 Extortion of S.M.

Collection of Unlawful Debts

Paragraph 13c
(1) DelGiorno/Iannarella/Scafidi/N. Milano Numbers Business
(2) Merlino/DelGiorno Numbers Business

The defendant is also charged in Count Three with substantive gambling violations and in Counts Six and Seven with Hobbs Act extortion.

In addition to his involvement in the Salvatore Testa murder and the Steven Ventro, Jr. attempted murder, as charged in the indictment, Salvatore Scafidi has been identified as being the assailant in two other violent incidents. These incidents were covered up by *La Cosa Nostra*. In one incident Scafidi shot Thomas Mangue to death as the result of an altercation between them. Francis Iannerella provided false testimony and an alibi witness that resulted in Scafidi being cleared of the charge (Notes of Testimony, pp. 43)44). In another incident, Nicholas Caramandi testified that Ralph Castabile arrived at Caramandi's house, having just been stabbed by Scafidi as a result of a barroom dispute. As Castabile began recovering in the hospital, Castabile and his wife were visited by Caramandi and Charles Iannece, who explained that they would have to cover-up the stabbing, because of who had done it. (Notes of Testimony, p. 38).

According to an unnamed but reliable informant, Salvatore Scafidi was given the "contract" to kill informants DelGiorno and Caramandi after they began cooperating. (Notes of Testimony, pp. 35-36).

Based on Salvatore Scafidi's several involvements with assaults and homicides, and his alleged assignment to kill two of the witnesses in this case, we find that the weight of the

conduct charged requires his continued incarceration, despite evidence and argument in his favor given at the hearing.

JOSEPH GRANDE

Joseph Grande is charged in Counts One and Two of the indictment with the following RICO predicate acts:

#6 Harry Riccobene Attempted Murder
#9 Frank Martines Attempted Murder
#11 Robert Riccobene Murder
#12 Salvatore Testa Murder
#24 Extortion of J.H.
#25 Extortion of J.S.
#34 Extortion of S.M.

In addition, he is charged with Hobbs Act extortion in Counts Six and Seven.

He is alleged to be an initiated member and soldier of *La Cosa Nostra* (Notes of Testimony, p. 31 and Government Exhibit 3, page 344). He is alleged to have been involved in "shakedowns" (Government Exhibit 5-T, pages 63-68). He is named in overt acts in the indictment involving his shooting at and attempting to kill Harry Riccobene (Overt Act #32), attempting to kill Tommy Aufiero (Overt Act #44), the attempted killing of Frank Martines (Overt Acts #51 and #53), planning the killing of associates of Harry Riccobene (Overt Act #59), the attempted killing of Richie Gregorio (Overt Acts #60 and #61), the killings of Robert Riccobene (Overt Act #66) and Salvatore Testa (Overt Acts #79 and #83).

We conclude that the weight of the charges against Joseph Grande and his commitment to *La Cosa Nostra* outweigh favorable evidence presented at the hearing, and requires his continued incarceration.

Having concluded our individual review of each defendant, we find that there is clear evidence which convinces us that each defendant falls within that class of persons which the bail reform act sought to control prior to trial. As the legislative history of the act noted:

> "there is a small but identifiable group of particularly dangerous defendants as to whom either the imposition of stringent release conditions nor the prospect of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial."

S.Rep. No. 225, 98th Cong., 1st Sess. 6-7 (1983), *reprinted* in 1984 U.S. Code *Cong. & Ad. News 1, 9 (Supp. 9A).*

Accordingly, we find that no condition or combination of conditions will reasonably assure the appearances of defendants as required and the safety of other persons and the community. In making this finding, we have evaluated all of the hearing evidence and the items found in Section 3142(g) of the Bail Act. We are not unmindful of the rights of the defendants, but the Congress has decided that the public also has rights in situations such as this. This is a very complex case and the expected trial date of November, 1988, coupled with the Government's efforts to begin in September, 1988, does not present an unreasonable time delay before trial. In short, we do not find that trial in this matter is likely to become excessively prolonged. *See U.S. v. Salerno*, ____U.S.____, 107 S.Ct. 2095 (1987) and *United States v. Colombo*, 777 F.2d 96, 100 (2d Cir. 1985). An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 88-00003(02)
	:	(07)
v.	:	(08)
	:	(09)
PHILIP LEONETTI,	:	(15)
a/k/a Phil	:	(17)
CHARLES IANNECE,	:	
a/k/a Charlie White	:	
SALVATORE WAYNE GRANDE	:	
a/k/a Wayne	:	
a/k/a Waynie	:	
JOSEPH PUNGITORE,	:	
a/k/a Joe Pung, a/k/a JP	:	
a/k/a PJ, a/k/a Minskie	:	
a/k/a Herman	:	
SALVATORE SCAFIDI	:	
a/k/a Tore	:	
a/k/a Reds	:	
JOSEPH GRANDE	:	

ORDER

AND NOW, this 9th day of June, 1988, IT IS HEREBY ORDERED THAT the requests for bail by defendants, Philip Leonetti, Charles Iannece, Salvatore Wayne Grande, Joseph Pungitore, Salvatore Scafidi, and Joseph Grande are DENIED and said defendants shall be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal; that they be afforded reasonable opportunity for private consultation with their respective counsel; and that, on an order of a court of the United States or on the request of an attorney for the government, the person in charge of the correction facility in which they are confined deliver them to a United

States marshal for the purpose of an appearance in connection with a court proceeding.

BY THE COURT:

FRANKLIN S. VAN ANTWERPEN,
United States District Judge